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Supreme Court, U.S.
FILED
FEB 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1987

WILLIAM EVANS
Petitioner

v.

STATE OF CONNECTICUT
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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Printed by
Brescia's Printing Services, Inc.
66 Connecticut Boulevard
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528-4254

QUESTION PRESENTED

1. Whether the Double Jeopardy Clause bars the State from appealing the Trial Court's dismissal of sexual assault charges against the Petitioner when the Dismissal Order was erroneous but on the merits and was entered after the jury was sworn but before any testimony was offered by the prosecution?

TABLE OF CONTENTS

Page

Question Presented.....i

Table of Cases.....iv

Opinion Below.....vi

Jurisdiction.....vi,vii

Constitutional Provisions Involved...viii

Statement of the Case.....1

Reasons for Granting The Writ:

I. THE DECISION OF THE CONNECTICUT SUPREME COURT REJECTING PETITIONER'S DOUBLE JEOPARDY CLAIM IS NOT IN ACCORD WITH SMALIS v. PENNSYLVANIA, 476 U.S. , 90 L. Ed.2d 116, 106 S.Ct. 1745 (1986); ARIZONA v. RUMSEY, 467 U.S. 203, 81 L. Ed.2d 164, 106 S.Ct. 2305 (1984); UNITED STATES v. SCOTT, 437 U.S. 82, 98 S.Ct. 2187, 57 L. Ed.2d 65 (1978); AND UNITED STATES v. MARTIN LINEN SUPPLY CO., 430 U.S. 564, 97 S.Ct. 1341, 5 L. Ed.2d 642 (1977).....8

Conclusion.....27

Appendix:

(1) OPINION OF THE CONNECTICUT SUPREME COURT dated December 15, 1987.....1A

(2) TRANSCRIPT OF ORAL DECISION OF TRIAL COURT dated February 14, 1986.....16A

(3) PETITIONER'S MOTION FOR FURTHER BILL OF PARTICULARS AND IN THE ALTERNATIVE TO DISMISS.....43A

TABLE OF CASES

Page

Arizona v. Rumsey, 467 U.S. 203, 81 L.Ed.2d 164, 106 S.Ct. 2305 (1984).....25

Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978).....19

Lee v. United States, 432 U.S. 23, 97 S.Ct. 2141, 53 L.Ed.2d 80 (1977)....21

Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 4166 (1982).....23

Smalis v. Pennsylvania, 476 U.S. , 90 L.Ed.2d 116, 106 S.Ct. 1745 (1986)..18

State v. Evans, 205 Conn. 528 (1987)...17

State v. Horton, 132 Conn. 276, 43 A.2d 744 (1945).....9,16

State v. Ramos, 176 Conn. 275, 407 A.2d 952 (1978).....8

United States v. Ball, 163 U.S. 662 (1896).....19

United States v. Martin Linen Supply Co. 430 U.S. 564, 97 S.Ct. 1349, 5 L.Ed.2d 642 (1977).....22

United States v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978).16,20,26

Wade v. Hunter, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed.974 (1949).....20

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v.

STATE OF CONNECTICUT

Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT FOR

THE STATE OF CONNECTICUT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above-named Petitioner respectfully prays that a writ of certiorari issue to review the order of the Supreme Court for the State of Connecticut entered in this proceeding on December 15, 1987.

OPINION BELOW

The Connecticut Supreme Court issued its opinion reversing the trial court's dismissal of the sexual assault charges on December 15, 1987 and is reported at 205 Conn. 528 (1987). A copy of the opinion is reprinted in petitioner's appendix. No motion for reargument was filed.

The trial court's oral opinion dismissing the sexual assault charges was delivered on February 14, 1986 (State of Connecticut v. William Evans, docket no. 51198, Superior Court, Judicial District of Hartford) and the transcript of that proceeding is reproduced in petitioner's appendix.

JURISDICTION

The order of the Connecticut Supreme Court was rendered on December 15, 1987. This petition for a writ of certiorari was

filed within sixty (60) days of the order. This Court's jurisdiction is involved pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner, William Evans, was charged by original information with two counts of sexual assault in the first degree in violation of Conn. Gen. Stat. (hereinafter "C.G.S.") §53a-70(a), two counts of sexual assault in the second degree in violation of C.G.S. §53a-71(a)(1), unlawful restraint in the first degree in violation of C.G.S. §53a-95(a) and risk of injury to a minor in violation of C.G.S. §53a-21 (R. at 1-2; the reference to the Record is the Record printed for the appeal to the Connecticut Supreme Court). All these charges arose out of a single event alleged to have occurred on or about July, 1984. The prosecution was commenced by an arrest warrant. The affidavit in support of the warrant alleges that the Petitioner, the Executive Director of a half-way house for alcoholics

that bears his name, sexually assaulted a 14-year-old resident of the house. The youngster did not report the single incident assault until six months after its alleged occurrence. The alleged victim's accusation was uncorroborated. On April 24, 1985, the Petitioner filed a motion for bill of particulars requesting, inter alia, the specific date and time of the offense. (R. at 2). The State did not object to the bill. On February 3, 1986, the State filed a substitute information which continued to allege that the acts giving rise to the charges occurred in July, 1984. (R. at 2-3). On February 4, 1986, jury selection commenced. Throughout jury selection, defense counsel voiced his concern about his ability to adequately raise an alibi defense without a more specific time and date. On February 10, 1986, the State filed a bill of particu-

lars which narrowed the date of the alleged offense to having occurred "during the late afternoon, early evening hours, on one of the last two weekends in July, 1984." (R. at 3-6).

That same day, the Petitioner filed a motion to dismiss and accompanying memorandum based on the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article 1, §§7, 8 and 20 of the Connecticut Constitution and Section 814 et seq. of the Connecticut Practice Book. (R. 6-7). More particularly, Petitioner requested that the information be dismissed for the reason that it was still not specific enough as to time and date for him to assert an alibi defense, to confront his accuser and, in general, to adequately present a defense. The motion to dismiss was denied by the trial judge, the Hon. Paul Vasington that same

day (February 10, 1986) on the ground that Petitioner had not demonstrated through affidavit or otherwise that he was prejudiced by the State's inability to specify the date of the offense. Immediately thereafter, the jury was sworn. (T. at 7; proceedings of February 10, 1986).

On February 11th, the court adjourned early because of inclement weather. On February 12th, Lincoln's Birthday, there were no court proceedings. Defense counsel continued investigations on all the dates.

On February 13th, Petitioner filed a motion for further bill of particulars and, in the alternative, a motion to dismiss. (R. at 7-10). Petitioner claimed that further investigation revealed that on three of the four dates, he had an alibi defense. Thus, the date on which

the offense occurred was highly material. Petitioner claimed that unless the State further specified the date of the alleged offense, the Petitioner would be seriously prejudiced in mounting a defense. In the alternative, Petitioner requested that the information be dismissed. The motion was denied. (R. at 11; T. at 8-15). On the same date, the State served upon the Petitioner a motion for disclosure of alibi witnesses pursuant to Section 763 of the Connecticut Practice Book. The State's motion, however, failed to state the date of the single incident offense as required by Section 763. (T. at 10-11).

On February 14th, Petitioner provided the court with affidavits from the three persons who would testify as alibi witnesses. (R. at 11-14; T. at 33). None of the alibi witnesses were members of the Petitioner's family but were persons pro-

fessionally affiliated with the Petitioner. On that same day, Judge Vasington granted Petitioner's motion to dismiss with prejudice on the ground that the specific date of the offense was material and an element the State must establish in order to make out a prima facie case. Since the State admitted it could not allege or prove the specific date a dismissal order was entered. The court's oral memorandum is reproduced in the appendix. Judge Vasington also granted the State permission to appeal the dismissal over Petitioner's objection on double jeopardy grounds. (T. at 31-32). On February 26, 1986, the State filed its appeal. (R. at 21-22).

PROCEEDINGS IN THE CONNECTICUT STATE APPELLATE COURT AND CONNECTICUT SUPREME COURT

After the appeal was filed, the Petitioner moved to dismiss the appeal in the Connecticut Appellate Court on the ground of double jeopardy. Argument was held and the Appellate Court denied the motion without opinion. Thereafter, the Connecticut Supreme Court assumed jurisdiction without request from the parties. In its brief, Petitioner again raised his double jeopardy claim. The Connecticut Supreme court rejected the claim in its opinion of December 15, 1987 and concluded that the trial judge erred in requiring the State to allege the specific date of the offense. The court further ruled that the dismissal was not an acquittal and therefore the Double Jeopardy Clause did not bar the State's appeal.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE CONNECTICUT SUPREME COURT REJECTING PETITIONER'S DOUBLE JEOPARDY CLAIM IS NOT IN ACCORD WITH SMALIS V. PENNSYLVANIA, 476 U.S. , 90 L.Ed.2d 116, 106 S.Ct. 1745 (1986); ARIZONA V. RUMSEY, 467 U.S. 203, 81 L. Ed.2d 164, 106 S. Ct. 2305 (1984); UNITED STATES V. SCOTT, 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed.2d 65 (1978); AND UNITED STATES V. MARTIN LINEN SUPPLY CO., 430 U.S. 564, 97 S. Ct. 1341, 5 L. Ed.2d 642 (1977).

I.

THE TRIAL COURT'S DISMISSAL ORDER ENTERED AFTER THE JURY WAS SWORN WAS BASED ON A CONCLUSION, ALBEIT ERRONEOUS, THAT THE STATE BORE THE BURDEN OF PROVING THE SPECIFIC DATE OF THE OFFENSE AS AN ELEMENT OF THE CRIMES CHARGED AND CONSEQUENTLY WAS A RESOLUTION BY THE TRIAL COURT IN DEFENDANT'S FAVOR ON THE MERITS AND CONSTITUTED AN ACQUITTAL FOR DOUBLE JEOPARDY PURPOSES.

The prosecution conceded to the trial court that it was unable to prove the specific date the Petitioner sexually assaulted the victim. The best the State could do was to provide four (4) possible dates on which the assault occurred.

Since the Petitioner had submitted affidavits to the trial court that on three of the four possible dates he had alibi witnesses, the court concluded that the date of the offense was material and the State was obligated to establish the date as an element of the offense beyond a reasonable doubt. The trial court's decision was based on an early Connecticut case, State v. Horton, 132 Conn. 276 (1945). There, the Connecticut Supreme Court said this:

> Time is not an essential ingredient of the crime of rape and it can be proved to have been committed at any time before the date of the information and within the period of the Statute of Limitations unless the date should become material in some way, as where a defense of alibi is to be made.

Id. at 277.

Before the trial court ruled, the prosecutor argued that the court would be in error if it required the State to prove the precise date of the offense:

> . . . The second argument the State wishes to pose to the Court, your Honor, is the issue that this is -- if the Court were to dismiss this matter, your Honor, that the Court is misinterpreting the laws on specificity when it comes to a bill of particulars. I think the Court is well aware that the general rule of law is that the State does not -- it's not essential to a state's prosecution that the crime be proved to be committed on the precise dates alleged, and any time the state proves that the crime was committed within the statute of limitations for that crime, your Honor, is valid prosecution. . . . (T. at 17-18); Appendix at 19A).

Thereafter, defense counsel argued that State v. Horton was controlling and the State should be required to prove the specific date.

> This case, State versus Horton, clearly says that the information in that case, and I am quoting from the opinion of the Connecticut Supreme Court, "The information laid the offense on or about October 16, 1944. Time is not an essential

> ingredient of the crime of rape and it can be proved to have been committed at any time before the date of the information and within the period of the statute of limitations, unless the date should become material in some way, as where a defense of alibi is to be made." That is exactly the issue here before the Court. We have indicated to the prosecution, to the Court, that the defense of alibi will be made in this case. . . .

(T. at 20-21; Appendix at 22A-23A).

The trial court then rendered its decision. Quoted below are excerpts from that opinion that bear directly on the double jeopardy issue:

> THE COURT: Before I enter or make my decision, I want to make some remarks.
>
> First of all, I want it completely understood that whatever decision I am going to make is in no way related to my opinion as to whether or not the defendant is guilty or not guilty of these charges. That is not my function. In the event I grant the motion to dismiss, that is not to be considered by anyone an opinion by me that I think that the defendant is innocent of these

charges. My decision is not to be given any weight with regards to innocence or guilt.

If I dismiss the charges, of course, the guilt or innocence of the defendant will always remain in his conscience and that will be something he will have to live with. That's not the basis for my decision.

. . . Now, further, I want it completely understood that this decision that I am making is not intended by me to establish any precendence (sic) that the date of an offense must be made specific in any and all cases. Our law is pretty well established that unless the date is an element of the -- material element of the crime, the specific date and time of the event is not essential. There's much authority in Connecticut to that effect.

Although there is not an excessive amount of authority, there is, however, authority that the date may be material where not providing the date may prejudice the rights of the defendant to assert defenses.

The Horton case in 132 Conn. indicates that, and I want to compliment Mr. D'Addabbo. I shepherdized this case last night and that particular principle was not included in any of the shepherd

citations. Evidently, it was not reported for that particular purpose. However, I must confess I don't remember the citation, but I think in 146 Conn. there was a case I read that might have been cited in the Orsinni case or the Nardini case, that indicates where prejudice may occur, dates are essential.

Now, I have labored mentally and philosophically over whether to grant this motion or not. I've given consideration to the fact that even though the defendant claims that he has an alibi for three of the four days involved, which is now supported by affidavits in the record, that the issue of whether or not this event occurred is a matter of credibility. It really makes no difference what date it occurred on. The important thing being that it occurred, insofar as the guilt of the accused is concerned.

If it occurred, it's immaterial when it occurred. The sole issue under that theory of reasoning would be whether or not the jury believed the victim beyond a reasonable doubt.

My next line of reasoning went along these lines: The defendant is, under our law, entitled to assert any defenses that he has to any charges that

are levied against him. One of such defenses is the alibi defense, and when an alibi defense is asserted, it becomes the obligation of the State to disprove beyond a reasonable doubt the alibi defense. But when an alibi defense is asserted, the jury now has two things to consider. One is the credibility of the victim. Secondly, the credibility of the alibi defense. It must then weigh one against the other and make a determination of which version it will believe; the victim or the alibi defense. Without knowing the specific dates that this event is alleged to have occurred, it's impossible for the jury to be able to weigh an alibi defense against the testimony of the victim because there is no way that the jury will be able to say, well, this event occurred on July 1st, hypothetically, and the defendant has an alibi for July 1st.

Now, it's up to me to decide, me, being the jury, whether I am going to believe the alibi defense or believe the victim. You can't make that confrontation or the jury can't be entitled to be allowed the right to that confrontation because you can't weigh one against the other. It may well be that if this event occurred, it did occur on the day that there is no alibi, but we'll

never know because we don't know what day it was. If it's alleged to have occurred on the day that the defendant has an alibi defense, of course, if that alibi defense were believed by the jury, they would then -- they would have disbelieved the victim and presumptively find him not guilty.

It's difficult for this Court to believe that under those circumstances the defendant would be entitled or be allowed to assert his right to the defense of an alibi.

Now, as I said, this determination of whether or not the date has to be made specific should be determined on a case-by-case basis. This is not intended to create any new law. It's just what I feel the situation merits in this particular case, and for the reasons indicated, your motion to dismiss is granted. (emphasis supplied). (T. at 24-27; Appendix at 29A-36A).

Based on the foregoing, it is quite clear that the trial court ruled that in the unique circumstances of the instant case the prosecution was required to es-

tablish the specific date as an element of proof. The State, of course, had conceded it could not do so.

In its opinion rejecting the double jeopardy claim, the Connecticut Supreme Court ignored the trial court's remarks that the date of the offense was an essential element the State must prove but instead relied solely on those comments made by the trial court that indicated that the court was not passing upon Defendant's guilt or innocence.

> . . . To support his double jeopardy claim the defendant asserts that regardless of the label placed on the action of the trial; United States v. Scott, supra, 97; in dismissing the substitute information after the jury was sworn, the judge implicitly made a factual finding that the state could not prove the date the offenses were committed, and under the Horton exception the date of the offense is material to his defense. State v. Horton, supra, 277. Thus, according to the defendant, the dismissal of

> the substitute information is functionally equivalent to an acquittal. This argument is attractive but not persuasive. The trial court in dismissing the substitute information specifically disclaimed making a factual determination of whether the defendant is guilty or innocent of the charges. We note that the dismissal was made not only over the exception of the state but at the persistent request of the defendant. We conclude, therefore, that the defendant has not presented any cognizable double jeopardy claim that would bar an appeal by the state to challenge the dismissal. . . .

State v. Evans, supra at 538. (Appendix at 11A).

The decision of the Connecticut Supreme Court fails to recognize that the trial court concluded that the precise date of the offense was an element the State had to establish beyond a reasonable doubt and, therefore, the dismissal was on

the merits. The Connecticut Supreme Court held that the State had no such burden. State v. Evans, supra at 537.

The Court also failed to consider the trial court's comments in their entirety and the fact that the court concluded, based on the affidavits and offers of proof made, that the critical issue was the victim's credibility and that the jury could not credit the victim's testimony beyond a reasonable doubt:

> "Without knowing the specific dates that this event is alleged to have occurred, it's impossible for the jury to be able to weigh an alibi defense against the testimony of the victim." (T. at 28; Appendix at 34A).

As such, the trial court's ruling is tantamount to a dismissal based on insufficient evidence, a dismissal on the merits of the State's case. The issue, then, for the Court is whether the erroneous dismissal by the trial court on the

merits bars the State from appealing under the Double Jeopardy Clause. The decisions by the Court are clear that the State is so barred.

Jeopardy attached in the instant case before the dismissal order entered since the jury had been previously sworn. Crist v. Bretz, 437 U.S. 28, 98 S. Ct. 2156, 57 L. Ed.2d 24 (1978). In the early case of United States v. Ball, 163 U.S. 662 (1986), the Court articulated two important principles of double jeopardy law which continue to have vitality. That Court held that

> a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offence (sic) of which he had been convicted.

Id. at 672. However, if a defendant is acquitted at trial,

> [t]he verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution.

Id. at 671.

When a final judgment of guilt or innocence has been entered by the trier of fact, the rules forbidding or allowing an appeal and subsequent retrial on the same offense are fairly straight-forward. However, when a trial is terminated after jeopardy has attached, i.e., after the jury is sworn in a jury trial and when the first witness is sworn at a bench trial (Crist v. Bretz, supra) but prior to a final judgment, the applicable rules are less clear. It is clear that when a mistrial is declared for "manifest necessity," a defendant may be retried for the same offense consistent with double jeopardy principles. Wade v. Hunter, 336 U.S. 684, 69 S. Ct. 834, 93 L. Ed. 974 (1949).

It is also clear that when a defendant requests a mistrial before termination of the proceedings, absent judicial or prosecutorial overreaching intended to provoke a mistrial request, a defendant may be retried. Oregon v. Kennedy, 456 U.S. 667, 102 S. Ct. 2083, 72 L. Ed.2d 416 (1982).

The Court has recently stated that a defendant may be retried even when a charge has been dismissed midtrial under circumstances functionally equivalent to a mistrial. Lee v. U.S., 432 U.S. 23, 97 S. Ct. 2141, 53 L. Ed.2d 80 (1977). In Lee, supra at 30, the Court stated:

> The critical question is whether the order contemplates an end to all prosecution of the defendant for the offense charged. A mistrial ruling invariably rests on grounds consistent with reprosecution, ... while a dismissal may or may not do so.

See also U.S. v. Scott, 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed.2d 65 (1978) (Dismissal of defendant's indictment, after jeopardy attached, based on preindictment delay not a ban to state's appeal since not a resolution of factual issues in defendant's favor).

The resolution of the question of whether an appeal will lie after a mid-trial dismissal depends on whether

> The ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.

Scott. supra at 97 quoting U.S. v. Martin Linen Supply Co., 430 U.S. 564, 571, 97 S. Ct. 1341, 5 L. Ed.2d 642 (1977). The label attached to a motion which terminates a proceeding during trial is not dispositive. The Court has "emphasized that what constitutes an 'acquittal' is not to

be controlled by the form of the judge's action." Martin, supra at 571; see also Scott, supra at 97.

In addition to United states v. Scott, supra and United States v. Martin Linen Supply Co., supra, two recent decisions of the Court appear to control on the issue of the State's right to appeal the dismissal order.

The question presented in Smalis v. Pennsylvania, 476 U.S. , 90 L. Ed.2d 116, 106 S. Ct. 1745 (1986) was whether the trial judge's grant of a demurrer to the defendant after the close of the State's case constituted an acquittal under the Double Jeopardy Clause, thus barring the State's appeal. The Supreme Court of Pennsylvania ruled that the demurrer under its procedure does not determine whether or not the defendant is guilty on the evidence but whether the

evidence is legally sufficient to warrant the conclusion that the defendant is guilty beyond a reasonable doubt. Therefore, said the Pennsylvania court, the demurrer is not the functional equivalent of an acquittal.

Reversing, the Court noted that by demurring the defendant sought a ruling that as a matter of law the State's evidence was insufficient to establish his factual guilt. Such a determination, said the Court, is an acquittal under the Double Jeopardy Clause.

In the instant case, the State conceded that it could not prove the date of the offense. The trial court concluded that the date was an essential element that the State must prove to make out a prima facie case. Under Connecticut practice, one of the grounds permitted to be raised by a motion to dismiss is

> . . . (5) defenses or objections based on the insufficency of evidence or cause to justify the bringing or continuing of such information or indictment or the placing of the defendant on trial; . . .

Conn. Practice Book §815. Although no evidence was presented on the issue of the date of the offense, none was necessary since the State admitted it could neither allege nor prove the date.

The fact that the Connecticut Supreme Court later determined that the State was not required to prove the specific date is irrelevant under the holding of Arizona v. Rumsey, 467 U.S. 203, 81 L. Ed.2d 164, 106 S. Ct. 2305 (1984). There, the trial judge during the sentencing phase of a death penalty case misconstrued Arizona law and concluded that the defendant was not subject to the death penalty. The Arizona Supreme Court remanded for further proceedings and the death penalty was then

imposed. The Court granted the writ of certiorari and held that the Double Jeopardy Clause prohibited Arizona from sentencing the defendant to death after the life sentence he had initially received was set aside on appeal, since Arizona's capital sentencing proceeding was like a trial and the defendant's initial sentence of life imprisonment constituted an acquittal of the death penalty. The fact that the trial judge, like the trial judge in the instant case, misconstrued state law was deemed irrelevant for double jeopardy purposes.

In making its findings, the trial court relied on a misconstruction of the statute defining the pecuniary gain aggravating circumstance. Reliance on an error of law, however, does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits.

> [T]he fact that "the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles" . . . affects the accuracy of that determination, but it does not alter its essential character. United States v. Scott, 437 U.S. 82, 98 57 L. Ed.2d 65, 98 S. Ct. 2187 (1978) (quoting Id. at 106, 57 L.Ed.2d 65, 98 S. Ct. 2187 (Brennan, J.,dissenting)). Thus, this court's cases hold that an acquittal on the merits bars retrial even if based on legal error. Id. 81 L. Ed.2d at 171.

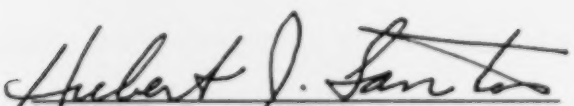
CONCLUSION

The Connecticut Supreme Court in the instant case determined that the trial court misconstrued State law in requiring the State to prove the date of the offense. The State conceded that it could neither allege nor prove the specific date. The jury was sworn before the trial court entered the dismissal order. The trial judge ruled, albeit erroneously,

that the State could not prove an essential element of the offenses charged. Consequently, under the foregoing authorities, the dismissal order was on the merits and an acquittal for Double Jeopardy purposes. The State, therefore, is barred from appealing the dismissal or retrying the Petitioner. For these reasons, Petitioner respectfully requests that the writ of certiorari be granted.

Respectfully submitted,

THE PETITIONER
WILLIAM EVANS



HUBERT J. SANTOS
A member of the Bar of the
Supreme Court of the United
States

NO._____

In The
Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM EVANS

Petitioner

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STATE OF CONNECTICUT

Respondent

APPENDIX

TABLE OF CONTENTS
TO APPENDIX

	PAGE
Decision of Connecticut Supreme Court Dated December 15, 1987	1A
Transcript of Oral Decision of Trial Judge Dismissing Information With Prejudice, Dated February 14, 1986	16A
Defendant's Motion for Further Bill of Particulars and in the Alternative to Dismiss With Supporting Affidavits Dated February 13, 1986	43A

NO. 12968

STATE OF CONNECTICUT :SUPREME COURT

v. :STATE OF CONNECTICUT

WILLIAM EVANS :DECEMBER 15, 1987

DECISION AND JUDGMENT OF

CONNECTICUT SUPREME COURT

STATE OF CONNECTICUT *v.* WILLIAM EVANS
(12968)

HEALEY, CALLAHAN, GLASS, COVELLO and HULL, Js.

The state, with the permission of the trial court, appealed from the judgment of that court dismissing with prejudice the information charging the defendant with the crimes of sexual assault in the first degree, attempted sexual assault in the first degree, sexual assault in the second degree, attempted sexual assault in the second degree, unlawful restraint and risk of injury to a minor. The defendant's motion to dismiss was granted on the ground that his alibi defense was prejudiced by the failure of the state to allege one of four possible dates as the specific date for the offense. *Held:*

1. The trial court erred in granting the defendant's motion to dismiss; the burdens and difficulties suffered by the defendant under the circumstances here were not of the kind and magnitude to warrant dismissal of the charges.

(One justice dissenting)

2. Because the motion to dismiss was granted at the request of the defendant, and because no evidence had been presented to enable the trier to make any factual determination in this case, the dismissal was not

the functional equivalent of an acquittal, and the state's appeal was not barred by the defendant's double jeopardy rights.

Argued October 9—decision released December 15, 1987

Substitute information charging the defendant with the crimes of sexual assault in the first degree, attempted sexual assault in the first degree, sexual assault in the second degree, attempted sexual assault in the second degree, unlawful restraint in the first degree, and risk of injury to a minor, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford, where the court, *Vasington, J,* granted the defendant's motion to dismiss and rendered judgment dismissing the information with prejudice, from which the state, on the granting of permission, appealed. *Error; further proceedings.*

Michael E. O'Hare, assistant state's attorney, with whom were *John M. Massameno* and *Frank D'Addabbo,* assistant state's attorneys, for the appellant (state).

Hubert J. Santos, for the appellee (defendant).

GLASS, J. The state has appealed from a decision of the trial court granting the defendant's motion to dismiss a substitute information. Specifically, the state claims that the trial court erred when it held that the inability of the state to allege the specific date of the occurrence of the crimes charged warranted a dismissal. We agree.

According to the affidavit in support of the warrant for the defendant's arrest, Sharon K. of Manchester came to the Glastonbury police department on December 14, 1984, and reported that her son, J, then fourteen years old, had been sexually abused by the defendant. She stated that while attending a family counseling session in New Hampshire on December 11, 1984, she had learned about the incident from her son.

According to Sharon K. the incident occurred at Evans House at 203 Williams Street, Glastonbury. Evans House is an alcoholic half-way house and the defendant, William Evans, was the executive director of the program. He resided at the house until his resignation in mid-October, 1984. Sharon K. described her family's relationship with the defendant as a close friendship. J attended Evans House during the summer of 1984 for counseling for alcohol abuse. On December 17, 1984, J was interviewed by Glastonbury police officer S. MacKinnon. J told MacKinnon that on a weekend in July, 1984, he was in the Evans House television room with the defendant and the defendant asked him if he "had ever done it with a man before?" J said "no" and ignored the defendant. The defendant suddenly grabbed J by the upper arm, pulled him to his feet and pushed him into the defendant's bedroom upstairs. In the bedroom the defendant took his clothes off and then undressed J. J stated that the defendant began feeling and nibbling his body and forced him to submit to fellatio for about ten minutes. The defendant then made J perform fellatio on him, and after doing so for a short time the defendant abruptly released him and went into the bathroom. J dressed and went back downstairs. J also recalled that the defendant later told him not to say anything about the incident because he, the defendant, was an important person in the community and it would hurt many people if anything was said about the matter. From other interviews MacKinnon was informed that the defendant terminated work at Evans House in mid-October, 1984, and his resignation was effective November 1, 1984. After his resignation at Evans House the defendant became a referrals counselor in New Hampshire until he resigned on December 19, 1984, after he had been confronted with the allegations of Sharon K. that he had sexually abused her son.

Initially the defendant was charged in an undated six count information with several sexual offenses arising out of the alleged incident. In counts one and two of the information he was charged with sexual assault in the first degree in violation of General Statutes § 53a-70 (a).[1] In counts three and four he was charged with sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1).[2] In count five he was charged with unlawful restraint in violation of General Statutes § 53a-95 (a).[3] In count six he was charged with risk of injury to a minor in violation of General Statutes § 53-21.[4] The original information alleged that

[1] "[General Statutes] Sec. 53a-70. SEXUAL ASSAULT IN THE FIRST DEGREE: CLASS B FELONY: ONE YEAR NOT SUSPENDABLE. (a) A person is guilty of sexual assault in the first degree when such person compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person.

"(b) Sexual assault in the first degree is a class B felony for which one year of the sentence imposed may not be suspended or reduced by the court."

[2] "[General Statutes] Sec. 53a-71. SEXUAL ASSAULT IN THE SECOND DEGREE: CLASS C FELONY: NINE MONTHS NOT SUSPENDABLE. (a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and such other person is (1) under [fifteen] years of age, or (2) mentally defective or mentally incapacitated to the extent that he is unable to consent to such sexual intercourse, or (3) physically helpless, or (4) less than eighteen years old and the actor is such person's guardian or otherwise responsible for the general supervision of such person's welfare, or (5) in the custody of law of detained in a hospital or other institution and the actor has supervisory or disciplinary authority over such other person.

"(b) Sexual assault in the second degree is a class C felony for which nine months of the sentence imposed may not be suspended or reduced by the court."

[3] "[General Statutes] Sec. 53a-95. UNLAWFUL RESTRAINT IN THE FIRST DEGREE: CLASS D FELONY. (a) A person is guilty of unlawful restraint in the first degree when he restrains another person under circumstances which expose the latter to a substantial risk of physical injury.

"(b) Unlawful restraint in the first degree is a class d felony."

[4] "[General Statutes] Sec. 53-21. INJURY OR RISK OF INJURY TO, OR IMPAIRING MORALS OF, CHILDREN. Any person who wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such

the offenses were committed "on or about July, 1984," in Glastonbury. On April 24, 1985, the defendant filed a motion for a bill of particulars requesting specifically the "date and time of the offense." On February 4, 1986, a substitute[5] information was filed changing count two to the charge of an attempt to commit sexual assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2)[6] and 53a-70 (a), and changing count four to an attempt to commit sexual assault in the second degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-71 (a) (1). The allegation as to the time of the offense and the allegations in all of the other counts remained the same as charged in the original information.

In response to the defendant's motion, on February 10, 1986, the state filed a bill of particulars alleging that the offenses occurred "during the late afternoon, early evening hours, on one of the last two weekends in July, 1984." This response restricted the occurrence of the offenses to one of four possible dates, July 21, 22, 28 or 29, 1984. Prior to trial on February 10, 1986, the defendant filed a motion to dismiss the information on the ground that "as to date and

a situation that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired, or does any act likely to impair the health or morals of any such child, shall be fined not more than five hundred dollars or imprisoned not more than ten years or both."

[5] In the pleadings and briefs, the parties refer to this substitute information as an amended information. In this opinion, we will refer to this information as a substitute information.

[6] "[General Statutes] Sec. 53a-49. CRIMINAL ATTEMPT: SUFFICIENCY OF CONDUCT; RENUNCIATION AS DEFENSE. (a) A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime he: (1) Intentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be; or (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."

time" the information was "not specific enough for him to assert an alibi defense, to confront his accuser, and in general to adequately present a defense." On the same day the trial judge denied this motion.

On February 13, 1986, after the jury had been selected and sworn, the defendant filed another motion requesting further particulars and in the alternative to dismiss the charges. In this motion he renewed his request for a more specific date of the offenses. The defendant also alleged that he had evidence to support an alibi defense for three of the four days disclosed by the state's response to his motion for a bill of particulars. After oral argument the trial court again denied the motion to dismiss.

On the following day, February 14, 1986, counsel for the defendant provided the court with the affidavits of three alibi witnesses. The affiants ostensibly provided the defendant with alibis for July 22, 28 and 29, 1984. No alibi witness or affidavit was offered for July 21, 1984, one of the days disclosed by the state as a possible date of the offenses. The trial court then reconsidered the defendant's motion to dismiss, reversed its prior decision and granted the defendant's motion to dismiss on February 14, 1986. The case was dismissed before the presentation of any evidence. In rendering its decision the trial court stated: "I want it completely understood that [this decision] is in no way related to my opinion as to whether or not the defendant is guilty or not guilty of these charges. That is not my function . . . [this decision] is not to be considered by anyone [as] an opinion by me that I think that the defendant is innocent of these charges. My decision is not to be given any weight with regards to innocence or guilt."

Immediately the state excepted to this ruling and requested permission to appeal. At the request of the defendant the case was dismissed with prejudice and

over the exception of the defendant the court granted the state's request for permission to appeal. After the appeal had been filed in the Appellate Court the defendant moved to dismiss the appeal, claiming that the state's appeal was barred by double jeopardy. After oral argument the Appellate Court denied the motion without an opinion on April 10, 1986. Thereafter, pursuant to Practice Book § 4023 this court transferred the appeal to itself.

The basic claim of the state on appeal is that the trial court erred in granting the defendant's motion to dismiss the substitute information. We agree. We reject the defendant's claim that the state's appeal be dismissed on the ground of double jeopardy, or in the alternative that the action of the trial court be affirmed.

I

It is undisputed that the jury had been sworn but that the state had presented no evidence before the motion to dismiss was granted. Moreover, in its oral memorandum of decision the trial court went to great pains to disclaim any factual finding of the defendant's guilt or innocence. Nonetheless, the defendant claims that " 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.' " *United States* v. *Scott*, 437 U.S. 82, 97, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978), quoting *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977). In support of his claim the defendant asserts that it is the general rule in Connecticut that "[t]ime is not an essential ingredient of the crime of rape and it can be proved to have been committed at any time before the date of the information and within the period of the Statute of Limitations unless the date should become mate-

rial in some way, as where a defense of alibi is to be made." *State* v. *Horton*, 132 Conn. 276, 277, 43 A.2d 744 (1945).

The defendant claims that his defense is alibi and the date of the alleged crime is material to his defense. Generally, any time that an alibi is asserted as a defense to a criminal charge the precise time that the offense is alleged to have been committed is material to the defense. But the effectiveness of the alibi claim is a factual question that is best left to the trier for determination after all of the evidence has been presented. Moreover, we have never held that when the charges are sex related and alibi is the defense asserted that the trial court should dismiss the charges unless the state, in response to a request, can allege the precise date of the offenses. We particularly decline to go that far in this case because the state has specified that the offenses were committed on one of four possible days on two consecutive weekends. The fact that the defendant has proffered affidavits of three persons who support his alibi for three of the four days is of no benefit to the defendant at this stage of the proceedings. We decline to hold that as a matter of law affidavits submitted in support of an alibi defense are irrefutable and the charges against a person asserting such a defense under these circumstances must be dismissed. The defendant has proffered three affidavits in support of his alibi, one affidavit for each day of three of the four days specified by the state as being the possible date of the offenses. Since the state has not pinpointed the date that the offenses allegedly occurred the defendant claims that his alibi defense is prejudiced. There is no claim, nor is there any evidence that the state knows the precise date of the alleged offenses and is deliberately withholding it from the defendant. We recognize that "[t]he state has a duty to inform a defendant, within reasonable limits of the time when

the offense charged was alleged to have been commited. The state does not have a duty, however, to disclose information which the state does not have. Neither the sixth amendment of the United States constitution nor article first, § 8 of the Connecticut constitution requires that the state choose a particular moment as the time of an offense when the best information available to the state is imprecise. If [there was evidence that] the state had known to a reasonable certainty that the [sexual offenses were] committed within a narrower time frame than that provided in the bill of particulars, then the defendant's claim . . . would be more convincing." *State* v. *Stepney*, 191 Conn. 233, 242, 464 A.2d 758 (1983), cert. denied, 465 U.S. 1084, 104 S. Ct. 1455, 79 L. Ed. 2d 772 (1984). We also recognize that because the state has been unable to be more precise the defendant's presentation of his alibi defense may be more burdensome and difficult. The burdens and difficulties, however, suffered by the defendant under these circumstances are not of the kind and magnitude to warrant dismissal of the charges.

Moreover, the dismissal of the substitute information is contrary to the law which governs at this stage of the case. "On a motion to dismiss an information, the proffered proof is to be viewed most favorably to the state." *State* v. *Morrill*, 193 Conn. 602, 611, 478 A.2d 994 (1984). It is undisputed that prior to the dismissal of the substitute information the trial judge had before him for consideration only the record pleadings (the substitute information and motions) and the three affidavits submitted by the defendant for consideration in support of his motion to dismiss. At this stage of the proceedings the affidavits were not evidence. The affidavits are not evidence any more than the substitute information and bill of particulars filed by the state alleging that the offenses occurred on one of four possible dates of two consecutive weekends. The trial judge

is obliged to evaluate the state's allegations in the substitute information and bill of particulars and the three affidavits submitted by the defendant in the light most favorable to the state. Id. Thus, the trial judge was required to assume that the state could prove the defendant guilty beyond a reasonable doubt of having committed the offenses on one of the four days specified in the substitute information despite the testimony, if any, of the defendant and the testimony of his witnesses in support of his alibi. Additionally, "[a]libi evidence, although commonly called a defense, is merely a rebuttal of the state's evidence. *State* v. *Bill*, 146 Conn. 693, 696–97, 155 A.2d 752 (1959). 'The burden is upon the accused in the first instance to produce evidence in support of the alibi. Whenever the defense is so far proved that upon the whole evidence a reasonable doubt as to the guilt of the defendant is caused, he is entitled to an acquittal.' Id., 697." *State* v. *Davis*, 192 Conn. 739, 745–46, 474 A.2d 776 (1984).The trial court erred in granting the defendant's motion to dismiss the substitute information.

II

Finally, the defendant claims that the dismissal of the information is the functional equivalent of an acquittal, and that the state's appeal is barred by double jeopardy. While there is no comparable state constitutional provision to the double jeopardy provision of the fifth amendment to the United States constitution, we have nonetheless in large part "adopted the common-law rule against it as necessary to the due process guaranteed by [article first, § 8,] of our Constitution." *Kohlfuss* v. *Warden*, 149 Conn. 692, 695, 183 A.2d 626, cert. denied, 371 U.S. 928, 83 S. Ct. 298, 9 L. Ed. 2d 235 (1962). Also, the double jeopardy provision of the fifth amendment has been made applicable to the states through the due process clause of the fourteenth amendment. *Benton* v. *Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

To support his double jeopardy claim the defendant asserts that regardless of the label placed on the action of the trial court; *United States* v. *Scott*, supra, 97; in dismissing the substitute information after the jury was sworn, the judge implicitly made a factual finding that the state could not prove the date the offenses were committed, and under the *Horton* exception the date of the offense is material to his defense. *State* v. *Horton*, supra, 277. Thus, according to the defendant, the dismissal of the substitute information is functionally equivalent to an acquittal. This argument is attractive but not persuasive. The trial court in dismissing the substitute information specifically disclaimed making a factual determination of whether the defendant is guilty or innocent of the charges. We note that the dismissal was made not only over the exception of the state but at the persistent request of the defendant. We conclude, therefore, that the defendant has not presented any cognizable double jeopardy claim that would bar an appeal by the state to challenge the dismissal. "We think that in a case such as this the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the [state] is permitted to appeal from such a ruling of the trial court in favor of the defendant." *United States* v. *Scott*, supra, 98–99. The *Scott* court in reviewing double jeopardy implications when a trial is aborted on the initiative of the judge as contrasted with a trial verdict reversed on an appeal stated that: " '[I]n the [second] situation the defendant has not been deprived of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal. On the other hand, where the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of his "valued right to

have his trial completed by a particular tribunal.'' ' '' *United States* v. *Scott*, supra, 99–100, quoting *United States* v. *Jorn*, 400 U.S. 470, 484, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971). The *Scott* court concluded that: "We think the same reasoning applies *in pari passu* where the defendant, instead of obtaining a reversal of his conviction on appeal, obtains the termination of the proceedings against him in the trial court without any finding by a court or jury as to his guilt or innocence. He has not been 'deprived' of his valued right to go to the first jury; only the public has been deprived of its valued right to 'one complete opportunity to convict those who have violated its laws.' *Arizona* v. *Washington*, [434 U.S. 497, 509, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1975)]." *United States* v. *Scott*, supra, 100. Because the motion to dismiss was granted at the request of the defendant, and because no evidence has been presented to enable the trier to make any factual determination in this case, we conclude that the dismissal of the substitute information is not the functional equivalent of an acquittal, and the state's appeal is not barred by the legal restraints of the law pertaining to the defendant's double jeopardy rights.

There is error, the judgment is set aside and the case is remanded with direction to deny the motion to dismiss and for further proceedings according to law.

In this opinion HEALEY, CALLAHAN and HULL, Js., concurred.

COVELLO, J., dissenting. I respectfully disagree with the position adopted by the majority.

It is certainly true that an information is not ordinarily fatally flawed by its failure to set forth with absolute particularity the date and time of the offense alleged. See *State* v. *Stepney*, 191 Conn. 233, 242, 464 A.2d 758 (1983); cert. denied, 465 U.S. 1084, 104 S.

Ct. 1455, 79 L. Ed. 2d 772 (1984). This is especially so in cases involving youthful victims of sexual assaults who may be subconsciously repressing the details of such a traumatic incident or who by reason of their age do not think in terms of dates or time spans.

The fact remains, however, that an accused has a right to be informed of the nature and cause of the accusations against him and the absence of definite allegations may have constitutional implications. See *State* v. *Cates*, 202 Conn. 615, 625--26, 522 A.2d 788 (1987). Further, the rules of practice require that the state, upon motion by the defendant, shall disclose the *date*, time and place of the offense charged. See Practice Book § 832.

The majority resolves the uneasy tension between these competing social and legal interests by simply declaring that the state "does not have a duty . . . to disclose information which the state does not have." *State* v. *Stepney*, supra. Further, "the burdens and difficulties" created by this absence of information are assigned to the defendant without explanation.

I submit that a fairer resolution is achieved by balancing these competing interests on a case-by-case basis by considering the many relevant factors. Both New Jersey and New York have used such a procedure in similar cases. See *State in Interest of K.A.W.*, 104 N.J. 112, 515 A.2d 1217 (1986); *People* v. *Morris*, 61 N.Y.2d 290, 461 N.E.2d 1256, 473 N.Y.S. 2d 769 (1984).

Relevant factors in this analysis may include (1) the age, intelligence and possible infirmities of the victim; (2) whether the crime charged is a single incident offense; (3) the length of time between the alleged offense and the defendant's arrest; (4) compliance with the rules of practice; (5) whether there is an offer of an alibi defense; (6) the time frame within which the offense is ultimately claimed to have occurred; and (7) the adequacy of the investigatory process.

In the present case, the victim was fourteen years old at the time of the alleged assault. He was just three months short of his sixteenth birthday at the time of trial. The offense involved only a single incident and was alleged to have occurred in July, 1984. It was not reported until five months later. Although the original information is undated, it is fairly inferable that the prosecution commenced in early 1985, approximately six months after the alleged offense.

On April 24, 1985, the defendant filed a motion for a bill of particulars pursuant to Practice Book § 830 et seq. requesting the specific date and time of the offense. *The state did not comply with the motion until the commencement of trial on February 10, 1986.* The defendant then learned for the first time that the state contended that the offense occurred on either July 21, 22, 28 or 29, 1984.

On February 13, 1986, the state filed a motion for disclosure of the names of alibi witnesses pursuant to Practice Book § 763. In stark contrast to the state's nine and one-half months delay in answering the defendant's motion for a bill of particulars, the defendant responded the very next day with the names of these alibi witnesses, annexing sworn affidavits containing the content of their testimony. The affidavits placed the defendant elsewhere on three of the four days in issue.

The alleged victim here was a teenager, not a preschooler with an undeveloped sense of time. He had been in counseling for alcohol abuse and, for unknown reasons, failed to report the alleged offense for four and one-half months. The state, when asked for a bill of particulars, inexplicably and indefensibly sat on the request for nine and one-half months, thereby removing even further the victim's apparently limited

recollection from the time of the alleged offense. We can only speculate as to what he might have been able to remember if he had been promptly asked.

Having weighed all of these factors, the court below reached the correct result in dismissing the information. I would find no error.

NO. 51198

STATE OF CONNECTICUT	:SUPERIOR COURT
v.	:J. D. of HARTFORD/NEW BRITAIN
WILLIAM EVANS	:

TRIAL COURT'S ORAL MEMORANDUM
DISMISSING THE SUBSTITUTE INFORMATION ON
FEBRUARY 14, 1986

FEBRUARY 14, 1986

THE COURT: The Court is going to reconsider the defense' motions for a further bill of particular, or in the alternative, the motion to dismiss if the State cannot make its bill of particulars more specific than the one dated February 10, 1986, which claims that these offenses occurred during the early evening hours on one of the last two weekends in July, 1984.

Do either counsel wish to be heard again?

MR. SANTOS: No, your Honor.

MR. D'ADDABBO: The State wishes to be heard.

THE COURT: All right.

MR. D'ADDABBO: Your Honor, I think at this point in time I am addressing the argument in opposition to the motion to dismiss.

The State basically has three arguments against the motion to dismiss, your Honor. One of them is timeliness. This motion was heard prior to the swearing in of the jury, your Honor. I believe it was last Friday, at which time counsel raised the motion after the State made its bill of particulars more specific, reducing it from July of 1984, to the last two weekends in July.

Your Honor, at that time counsel presented to the Court orally that he had alibi witnesses and I believe his testimony, and counsel could correct me if I am incorrect, was that he at that point in time had three out of the four possible days of the incident -- of the alleged

incident covered by alibi witnesses. At that time the Court made a decision denying the motion to dismiss, stating that in accordance with most of the case law, State versus Ramos, State versus Bowman, State versus Orsinni, that the defendant has not shown the necessary prejudice which is required under those cases, to grant a motion to dismiss, your Honor. At that point, your Honor, the Court denied the motion. It's now brought before the Court again. Nothing has changed, you Honor, except that counsel has been able to present to you, I take it, instead of just his word or his oral statement that he has alibi witnesses covering three out of the four dates, and he now has affidavits of these alibi witnesses covering three out of the four days. The State contends that the

situation has not changed and there is still the lack of requisite showing of prejudice.

The second argument the State wishes to pose to the Court, your Honor, is the issue that this -- if the Court were to dismiss this matter, your Honor, that the Court is misinterpreting the laws on specificity when it comes to a bill of particulars. I think the Court is well aware that the general rule of law is that the State does not -- it's not essential to a state's prosecution that the crime be proved to be committed on the precise dates alleged, and any time the state proves that the crime was committed within the statute of limitations for that crime, your Honor, is valid prosecution.

Again I cite State versus Ramos, State versus Bowman and State versus Orsinni. The Court, in our many discussions in

chambers and, I believe, if my recollection serves me correctly, in the previous argument on the motion to dismiss, was relying heavily on counsel's assertion of State versus Horton which came down in July of 1945, which is cited at 132 Conn. 276, which basically enforces the position of Orsinni, Bowman and Ramos, except that it adds the line that time may become material, and it has one line, "Where a defense of alibi is to be made." It should be known, your Honor, that the case was -- first of all, there was a conviction. Second of all, the case was affirmed by the Connecticut Supreme Court. Shepherdizing this case to see what principle of law this case stands for, it's interesting to note that it was cited in two cases; one, State versus Nardini, speaking about severence and clemency, basically talking about the

sentence review division, and not for the principle about alibi defense when it comes to a bill of particular.

The other case that was cited was the Bowman case standing for the principle that the state does not have to be specific; so I have some question on the worth of State versus Horton. It's interesting to note if you backtrack the case, that Horton cited as its basis, specifically State versus Farris at 81 Conn. 97, that case was talking about alibi defenses on a specific date alleged and in a jury instruction. So once again, it doesn't address the issue which the Court is presented here.

The State has a problem both by reliance by the defendant and the Court with the State versus Horton case.

Finally, your Honor, I think the Court should consider the consequences or the precedential value of the court decision if

it were to dismiss this case, your Honor. What it is implying is that a retarded individual was sexually assaulted and can't recall the dates and the defense is able to produce alibi witnesses, it would be a bar to prosecution, or even on the point where anytime the defendant present -- allegedly presents that there is alibi witnesses to a specific date, that the state is barred from prosecution, and I don't believe that the Court is saying that, but I believe that is the inference that will be drawn from this type of case, your Honor, this type of decision.

I believe, your Honor, that for all of the reasons, the State objects to the motion to dismiss.

MR. SANTOS: Your Honor, if I might just put something on the record in light of the State's argument.

This case, State versus Horton, clearly says that the information in that case, and I am quoting from the opinion of the Connecticut Supreme Court, "The information laid the offense on or about October 16, 1944. Times is not an essential ingredient of the crime of rape and it can be proved to have been committed at any time before the date of the information and within the period of the statute of limitations, unless the date should become material in some way, as where a defense of alibi is to be made." That is exactly the issue here before the Court. We have indicated to the prosecution, to the Court, that the defense of alibi will be made in this case.

The State has supplied us with a demand for alibi witnesses and the Practice Book rule says that when, in those circumstances, the State has to provide us

with the date, time and place of the commission of the offense, so most certainly the Practice Book rule, Section 763, demand by the State for disclosure of alibi witnesses, contemplates a specific date be given.

Now, second of all, it seems to me we were put in a very difficult position because we were given four dates. In essence, we were given four dates as to when the crime may have been committed. We've indicated to the Court, supplied affidavits to establish that three of those four dates the defendant has a substantial alibi defense that he would have asserted if the case continues. Those are very substantial defenses.

One of the dates we cannot cover with an alibi defense. How is anyone going to know what date the jury picks? How is anyone going to know what to argue to the

jury? I mean what am I going to argue to the jury? If you find one of the three, that you should find him not guilty? If I make that argument to the jury you can see a circumstances where it's going to be very difficult because the other side of the coin there it hasn't covered all of the dates. I don't think it's too much of a burden when you don't have a situation of mental retardation or something like that, which I think is a separate situation. I don't think it's too much of a burden when you have a single-incident case, a single-incident case to disclose the date to the defense, and I think that this is within the sound discretion of the Court.

The Court has before it through the discussions we've had and through the offers of proof and through the psychiatric records, a full idea of what this case is about.

This case is about an allegation by a young boy who has a troubled past, extensive psychiatric history, serious family problems, who makes the allegation against my client on December 11, 1984, almost five months after the incident occurred. There is no corroboration of the allegation and he can't give us the date of the offense, so it seems to me under the totality of the circumstances of this particular case, that it is within the discretion of the trial court to dismiss the information because this is a rather unique factual situation. This is not a case of a four-year-old child or of a retarded child or something of that short. This is a case where it's impossible to defend it through an alibi defense.

If the defense were consent, then obviously there would be no need. Time would not be material if it were consent,

but the defense here is the defendant was not where this young boy claims he was on the time that he refers to, the four dates he refers to. As a matter of fact, I might further note for the record that if you look at the statements in this case, the date gets even more vague. The mother, who first reported the incident to the Glastonbury police, indicated that the boy had indicated to her that the incident occurred in the summer of 1984. When the boy was first interviewed by the police, he told them that the incident occurred in July of 1984. Now, after we press and press and press, now we're down to four dates, but it would be even more murky in terms of evidence.

Lastly, let me just point out this issue of timeliness. I think the motion that I filed set out the chronology of defense. When the State filed its amended

bill of particulars giving us the four dates, we then prepared a motion to dismiss at the break and came back to the court at 2:00 o'clock and submitted it to the Court. At that point it was my belief that we would be able to cover three of the four dates based upon my discussion with my client, but at that point I could not independently verify that because I did not have sufficient time to talk to the alibi witnesses that I had learned about. I could not -- I didn't have time to talk about it. After the Court denied the motion because I hadn't been able to show a prejudice, and after the jury was sworn, I then was able later that afternoon and the next day to talk to the alibi witnesses and to confirm that we can, in fact, cover those three of the four dates, and subsequently this morning proffer the affidavits to the Court, which I suppose

should be marked, if the Court is going to act on the motion. But I just wanted to make that clear. My written motion, in fact, makes that clear.

Thank you, your Honor.

THE COURT: Before I enter or make my decision, I want to make some remarks.

First of all, I want it completely understood that whatever decision I am going to make is in no way related to my opinion as to whether or not the defendant is guilty or not guilty of these charges. That is not my function. In the event I grant the motion to dismiss, that is not to be considered by anyone an opinion by me that I think that the defendant is innocent of these charges. My decision is not to be given any weight with regards to innocence or guilt.

If I dismiss the charges, of course, the guilt or innocence of the defendant will always remain in his conscience and that will be something he will have to live with. That's not the basis for my decision.

Also, I want it completely understood that my decision is in no way determined by the background of the victim. I've read the complete psychiatric records of Jeffrey. I sympathize with the boy. I don't feel he's as bad as defense would attempt to make him out. I've read the records. He has his problem, but we all have problems. Hopefully, his problems will straighten out. But be that as it may, I just want his family to rest assured that my decision, in the event I grant this motion which I am going to do, I think, is

not to be -- is not determined by his background, behavior or any psychiatric problems that he might have.

Now, further, I want it completely understood that this decision that I am making is not intended by me to establish any precendence that the date of an offense must be made specific in any and all cases. Our law is pretty well established that unless the date is an element of the -- material element of the crime, the specific date and time of the event is not essential. There's much authority in Connecticut to that effect.

Although there is not an excessive amount of authority, there is, however, authority that the date may be material where not providing the date may prejudice the rights of the defendant to assert defenses.

The Horton case in 132 Conn. indicates that, and I want to compliment Mr. D'Addabbo. I shepherdized this case last night and that particular principle was not included in any of the shepherd citations. Evidently, it was not reported for that particular purpose. However, I must confess I don't remember the citation, but I think in 146 Conn. there was a case I read that might have been cited in the Orsinni case or the Nardini case, that indicates where prejudice may occur, dates are essential.

Now, I have labored mentally and philosophically over whether to grant this motion or not. I've given consideration to the fact that even though the defendant claims that he has an alibi for three of the four days involved, which is now supported by affidavits in the record, that the issue of whether or not this even

occurred is a matter of credibility. It really makes no difference what date it occurred on. The important thing being that it occurred, insofar as the guilt of the accused is concerned.

If it occurred, it's immaterial when it occurred. The sole issue under that theory of reasoning would be whether or not the jury believed the victim beyond a reasonable doubt.

My next line of reasoning went along these lines: the defendant is, under our law, entitled to assert any defenses that he has to any charges that are levied against him. One of such defenses is the alibi defense, and when an alibi defense is asserted, it becomes the obligation of the State to disprove beyond a reasonable doubt the alibi defense. But when an alibi defense is asserted, the jury now has two things to consider. One is the credibility

of the victim. Secondly, the credibility of the alibi defense. It must then weigh one against the other and make a determination of which version it will believe; the victim or the alibi defense. Without knowing the specific dates that this event is alleged to have occurred, it's impossible for the jury to be able to weigh an alibi defense against the testimony of the victim because there is no way that the jury will be able to say, well, this event occurred on July 1st, hypothetically, and the defendant has an alibi for July 1st.

Now, it's up to me to decide, me, being the jury, whether I am going to believe the alibi defense or believe the victim. You can't make that confrontation or the jury can't be entitled to be allowed the right to that confrontation because you can't weigh one against the other. It may

well be that if this event occurred, it did occur on the day that there is no alibi, but we'll never know because we don't know what day it was. It it's alleged to have occurred on the day that the defendant has an alibi defense, of course, if that alibi defense were believed by the jury, they would then -- they would have disbelieved the victim and presumptively find him not guilty.

It's difficult for this Court to believe that under those circumstances the defendant would be entitled or be allowed to assert his right to the defense of an alibi.

Now, as I said, this determination of whether or not the date has to be made specific should be determined on a case-by-case basis. This is not intended to create any new law. It's just what I feel

the situation merits in this particular case, and for the reasons indicated, you motion to dismiss is granted.

MR. D'ADDABBO: May I be heard, your Honor?

THE COURT: Yes.

MR. D'ADDABBO: The State will take an exception to your decision.

THE COURT: You may have an exception.

MR. D'ADDABBO: Your Honor, at this time the State is going to ask the Court for permission to appeal its decision, and if I can just lay a little bit of a foundation, your Honor, for the basis of that permission.

I realize that the jury has been sworn in on this case, but I still feel and I think the law supports it, that this is analogous to a mistrial situation where the motion, as indicated by counsel and myself, was put forward to the Court before the

jury was sworn, and was represented to the Court by defense counsel that there were three alibi witnesses covering three out of the four dates. The motion has then been renewed after the jury was sworn. As I indicated earlier, the only difference is that they are now -- the three alibi witnesses are now in the affidavit form, your Honor.

I should also indicate, your Honor, that there has been no evidence taken in front of the jury. The jury has not heard one bit of testimony or one bit of evidence, so at this point the State asks the Court for permission to appeal its decision.

MR. SANTOS: May I be heard, your Honor?

THE COURT: Yes.

MR. SANTOS: First, you Honor, I would ask the Court for an order of dismissal with prejudice in accordance with the requirements of 819 of the Practice Book. I think you'd have to do that with prejudice.

THE COURT: Do you have any objection to that?

MR. D'ADDABBO: It has to be a final decision.

THE COURT: I never quite understand what the words "with prejudice" mean. This is something that came along after I got on the bench. 819?

MR. D'ADDABBO: Yes, Sir.

MR. SANTOS: Yes, Sir.

THE COURT: All right, OH, yes, it's with prejudice.

MR. SANTOS: Thank you, your Honor.

THE COURT: The charges against the defendant are dismissed with prejudice.

MR. SANTOS: Thank you, your Honor. Just briefly, I would oppose the State's request for permission to appeal on the ground that I feel that the double-jeopardy clause of the Federal Constitution and our common law double jeopardy under state law prohibits the State from appealing in light of the fact that the jury has been sworn.

THE COURT: All right. Mr. Santos, just to clarify the record, -- you may sit down. You don't have to stand. At the time I first entertained this motion to dismiss, I was led to believe that I would have an affidavit concerning the alibi. At that time, had I had the affidavit, my action might have been different in granted the motion or denying it. This was done at a time prior to the jury having been sworn. You did not present me -- you indicated on the record that you preferred, for whatever reason, you had stated that reason but

whatever the reason being, that you would prefer not to submit it at that time. I think, as you indicated this morning, you weren't quite sure. In view of that and not showing any prejudice at that time, I denied your motion. We swore in the jury and we started. You now pressed your motion and I am going to deny your objection and I am going to give the State, because I feel that maybe this issue on the specific date is sexual assault cases, because they do involve minor children, young children in many cases, maybe this should be an issue that should be resolved by the Supreme Court, and brought up to date. Or maybe it's something that the legislature should take into consideration, so I am going to allow him the right to appeal my decision.

MR. SANTOS: Exception, your Honor.

THE COURT: You may have an exception.

MR. SANTOS: I just want the record to reflect the reason I did not submit an affidavit to the Court when I filed the motion to dismiss before the jury was sworn. A that point I did not have an opportunity to personally contact the alibi witnesses.

THE COURT: You indicated that.

MR. SANTOS: I just want the record to be clear. After I did that, I did submit this morning those three affidavits to the Court, which should be marked, your Honor, as Court exhibits.

THE COURT: Yes. I'm going to mark these affidavits as Court Exhibits 2, 3 and 4. You can give copies to the State also. Do you have copies of these, Mr. Santos?

MR. SANTOS: No.

THE COURT: Give a copy -- why don't you mark them and then give copies to all counsel.

(Court's Exhibits 2,3 and 4: So marked.)

THE COURT: All right. You all excused. I'm going to bring the jury in and I want to talk to the jury myself.

* * * * *

NO. 51198

STATE OF CONNECTICUT	:SUPERIOR COURT
v.	:J. D. of HARTFORD/NEW BRITAIN
WILLIAM EVANS	:

DEFENDANT'S MOTION FOR
FURTHER BILL OF PARTICULARS
AND IN THE ALTERNATIVE TO DISMISS

MOTION FOR FURTHER BILL OF PARTICULARS AND IN THE ALTERNATIVE TO DISMISS

Pursuant to the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, Article 1, Secs. 7, 8 and 20 of the Connecticut Constitution, Sections 830, et. seq. and 814, et. seq. of the Practice Book, the Defendant respectfully requests the Court to order the State's Attorney to make the information more specific by stating the date of the offense. In support of the motion the Defendant claims the following:

1. By way of a motion dated April 24, 1985 the Defendant filed a motion for bill of particulars and requested in part that the State specify the date and time of the offense.

2. In response to the motion the State prepared an information alleging that the offense occurred in July, 1984.

3. After the Defendant protested the time frame was not sufficiently specific the State filed an amended information on February 9, 1985. That information limited the offense to one of four possible dates - July 21,22, 28 or 29, 1984.

4. The amended information was filed at approximately 2:00 p.m. on February 9, 1985. Thereafter the Defendant moved to dismiss the information on the ground that the date was not sufficiently specific. The Court denied the motion on the ground that the Defendant had failed to establish how he was prejudiced by the State's failure to specify the date.

5. The State filed its amended information after the jury was selected but before it was sworn. After the denial of the motion to dismiss the Court swore the jury on February 9, 1986.

6. Thereafter, and now provided with four possible dates that the crimes are alleged to have occurred, the defense commenced a further investigation and inquiry to determine the Defendant's whereabouts on the four dates.

7. The defense spoke to possible alibi witnesses on February 9, 1985 after the Court adjourned and again on February 10, 1986. The possible alibi witnesses were questioned on February 11, 1986 after Court adjourned because of inclement weather.

8. Defense efforts continued on February 12, 1986, a Court holiday.

9. Based upon the foregoing, the defense has solid evidence to support an alibi defense on three of the four dates disclosed by the State. Without the specific date of the alleged offenses the Defendant will be seriously prejudiced and his constitutional rights to due process, equal protection, confrontation and

effective assistance of counsel under the State and Federal Constitutions violated. Furthermore, the defense will be unable to effectively argue for a judgment of acquittal after the State rests or the evidence concludes without the specific date of the offense. In addition neither the Defendant nor a reviewing court will be able to determine the basis of the jury's decision nor the date the jury found the offense was committed without a specific date.

10. Time is of the essence in the instant case since the defense is not consent but that the alleged victim fabricated the incident. The fact that the Defendant was elsewhere on the date of the alleged incident would raise a reasonable doubt as to Defendant's guilt.

11. In the event the State cannot provide the specific date of the offense the Defendant requests the amended information be dismissed.

12. That the Defendant is entitled to a specific date from the State finds support in Section 763 of the Practice Book. That section requires the defense to disclose the names and addresses of alibi witnesses if the State makes demand for same and if the prosecuting authority states the time, date and place at which the alleged offense was committed:

> Upon written demand filed by the prosecuting authority stating the time, date, and place at which the alleged offense was committed, the defendant shall file within ten days, or at such other time as the judicial authority may direct, a written notice of his intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi. (P.B. 1963, Sec. 2174).

13. Furthermore, the standard alibi jury charges contemplate that the Defendant is charged with committing the crime on a specific date. Wright, II Connecticut Jury Instructions Sec. 653 and

654; Devitt and Blackmar, I Federal Jury Instructions, Sec. 13.08; Sand, et al, I Modern Federal Jury Instructions, Sec. 8.02.

The Defendant

By Hubert J. Santos
His Attorney
Buckley & Santos
51 Russ Street
Hartford, CT 06106

Dated February 13, 1986

ORDER

Denied this 13 day of February, 1986.

By the Court
Vasington, J.

ORDER

Motion granted by order of the court, Vasington, J., February 14, 1986.

Charges against defendant William Evans are Dismissed with Prejudice.

State's motion to appeal granted per order of the court, Vasington, J. on February 14, 1986.

W. Wholean
Assistant Clerk

Dated February 14, 1986

[Clerk's Note: The following affidavits were submitted in support of preceding defendant's motions and are referred to in the court's oral memorandum of decision.]

AFFIDAVIT

I, RAYMOND D. O'NEILL, of the Town of East Hampton being duly sworn depose and say:

1. I am 45 years of age and know the obligations of an oath.

2. I have known William Evans for a number of years.

3. I was married on July 28, 1984 at St. Paul's Church in Glastonbury, Connecticut. Mr. Evans was the best man at the wedding. On the same date the wedding reception was held at Evans House and commenced at approximately 3:00 p.m.

4. Approximately 150 to 200 persons attended the reception. Evans House was decorated and there was music, dancing and food.

I, JOHN R. HORSEY, of the Town of Farmington being duly sworn depose and say:

1. I am 64 years of age and know the obligations of an oath.

2. I have known William Evans professionally since 1981.

3. I am a Regional Services Representative for Mediplex Group, Inc.

4. On July 22, 1984 I picked Mr. Evans up at Evans House at approximately 12:00 noon and drove to Arms Acres in Carmel, New York for the annual alumni barbecue.

5. We left the barbecue at approximately 4:00 p.m. and drove to Schenectady, New York where we stayed that evening.

6. The next morning, July 23, 1984, we drove to Conifer Park in Scotia, New York and left there at approximately 2:00 p.m.

7. I then drive Mr. Evans back to Connecticut and left him off at Evans House at approximately 5:00 p.m.

/s/ JOHN R. HORSEY

Subscribed and sworn to before me this 14th day of February, 1986.

/s/ Hubert J. Santos
Commissioner of the
Superior Court

Dated February 14, 1986

FILED
MAR 11
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1378 (2)

In The
Supreme Court Of The United States

OCTOBER TERM, 1987

WILLIAM EVANS,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF CONNECTICUT

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13 pp

Printed by

Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

QUESTION PRESENTED

DOES THE DOUBLE JEOPARDY CLAUSE PRECLUDE PROSECUTION FOLLOWING A DISMISSAL BASED ON THE TRIAL COURT'S ERRONEOUS CONCLUSION THAT THE STATE'S INABILITY TO ALLEGE THE SPECIFIC DATE OF THE OFFENSE DENIED THE DEFENDANT HIS RIGHT TO NOTICE AND TO PRESENT AN ALIBI?

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED iii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 7

REASONS FOR DENIAL OF THE WRIT . . 9

PETITIONER'S CLAIM IS CONTROLLED BY ESTABLISHED CASE LAW AND THUS DOES NOT WARRANT THIS COURT'S ATTENTION 9

CONCLUSION 18

TABLE OF AUTHORITIES

CASES **PAGE**

Arizona v. Washington, 434 U.S. 497 (1978) 17

Serfass v. United States, 420 U.S. 377 (1975) 9

State v. Evans, 205 Conn. 528, 534 A.2d 1159 (1988) 7, 8, 11, 13

United States v. Maker, 751 F.2d 614 (3rd Cir. 1984) cert. denied, 472 U.S. 1017 (1985) 16

United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) 10

United States v. Scott, 437 U.S. 82 (1978) 10, 17

United States v. Sisson, 399 U.S. 267 (1970) 12

STATUTES

Connecticut General Statutes § 53-21 1

Connecticut General Statutes § 53a-49(a)(2) 2

Connecticut General Statutes § 53a-70(a) 1,.2

STATUTES-CONTINUED **PAGE**

Connecticut General Statutes § 53a-71(a) 1

General Statutes § 53a-71(a)(1) . . . 2

Connecticut General Statutes § 53a-95(a) 1

Connecticut General Statutes § 54-96 5

RULES OF COURT

Practice Book § 831 2

Practice Book § 4023 6

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONNECTICUT GENERAL STATUTES

Sec. 53-21. Injury or risk of injury to, or impairing morals of, children. Any person who willfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that its life or limb is endangered, or its health is likely to be impaired, or does any act likely to impair the health or morals of any such child, shall be fined not more than five hundred dollars or imprisoned not more than ten years or both.

Sec. 53a-49. Criminal Attempt: Sufficiency of conduct; renunciation as defense. (a) A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime he: (1)

Intentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be; or (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or ommission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

(b) Conduct shall not be held to constitute a substantial step under subdivision (2) of subsection (a) unless it is strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law: (1) Lying in wait, searching for or following the contemplated victim of the crime to go to the place contemplated for its commission; (3) reconnoitering

the place contemplated for the commission of the crime; (4) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed; (5) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances; (6) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances; (7) soliciting an innocent agent to engage in conduct constituting an element of the crime.

(c) When the actor's conduct would

otherwise constitute an attempt under subsection (a), it shall be a defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

Sec. 53a-70. Sexual assault in the first degree: Class B felony: One year not suspendable. (a) A person is guilty of sexual assault in the first degree when such person compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person.

(b) Sexual assault in the first

degree is a class B felony for which one year of the sentence imposed may not be suspended or reduced by the court.

Sec. 53a-71. Sexual assault in the second degree: Class C felony: Nine months not suspendable. (a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and such other person is (1) under fifteen years of age, or (2) mentally defective or mentally incapacitated to the extent that he is unable to consent to such sexual intercourse, or (3) physically helpless, or (4) less than eighteen years old and the actor is such person's guardian or otherwise responsible for the welfare, or (5) in custody of law or detained in a hospital or other institution and the actor has

supervisory or disciplinary authority over such other person.

(b) Sexual assault in the second degree is a class C felony for which nine months of the sentence imposed may not be suspended or reduced by the court.

Sec. 53a-95. Unlawful restraint in the first degree: Class D felony. (a) A person is guilty of unlawful restraint in the first degree when he restrains another person under circumstances which expose the latter to a substantial risk of physical injury.

(b) Unlawful restraint in the first degree is a class D felony.

Sec. 54-96. Appeals by the state from superior court in criminal cases. Appeals from the rulings and decisions of the superior court, upon all ques-

tions of law arising on the trial of crimnal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court or to the appellate court, in the same manner and to the same effect as if made by the accused.

§ 831 Bill of Particulars--Time for Filing

Pursuant to Sec. 811, the defendant may make a motion, or the judicial authority may order at any time, that the prosecuting authority file a bill of particulars.

§ 4023. Transfer of Cases by Supreme Court-In General

The supreme court may transfer to itself a cause in the appellate court. Except for any matter brought pursuant to its original jurisdiction under the

constitution, the supreme court may transfer a cause or class of causes from itself, including any cause or class of causes pending on July 1, 1983, to the appellate court. The court to which a cause is transferred has jurisdiction.

There shall be no fee on such transfer, but an appellant other than the state or a party for whom fees, costs and security have been waived pursuant to Sec. 4016 shall within 20 days file in the trial court a substituted recognizance in the amount of $500.00. The chief clerk of the supreme court shall notify all parties and the clerk of the trial court that the appeal has been transferred. A case so transferred shall be entered upon the docket of the court to which it has been transferred and the chief clerk shall

require the parties to take such steps as may be necessary to make the appeal conform to the rules of the court to which it has been transferred.

Upon the transfer of an appeal, the time within which the briefs or other documents must be filed shall be governed by the rules of the court to which the case has been transferred, except that such time limit for the document next to be filed shall not be less than thirty days from issuance of the notice of transfer.

STATEMENT OF THE CASE

The state charged the defendant in an undated six count information with two counts of sexual assault in the first degree, Connecticut General Statutes § 53a-70(a)[1]; two counts of sexual assault in the second degree, Connecticut General Statutes § 53a-71(a); one count of unlawful restraint in the first degree, Connecticut General Statutes § 53a-95(a); and one count of risk of injury to a minor, Connecticut General Statutes § 53-21. R. at 1.[2] In its arrest warrant affidavit and pleadings, the state alleged that during July 1984 the defendant sexually assaulted a

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[1] The text of all Constitutional, statutory, and Connecticut Practice Book provisions appears supra, pages iii-xii.

[2] Citations are to the printed Record in the Connecticut Supreme Court.

fourteen year old boy enrolled in an alcohol counseling program run by the defendant.

On April 24, 1985, the defendant filed a motion for a Bill of Particulars requesting, inter alia, that the state specify the date and time of the offenses charged. See Practice Book § 831. R. at 2. On February 4, 1986, the state filed a substitute information deleting one count of sexual assault in the first degree and one count of sexual assault in the second degree and adding a count each of attempted sexual assault in the first degree and attempted sexual assault in the second degree, Connecticut General Statutes §§ 53a-49(a)(2), 53a-70(a), 53a-71(a)(1). R. at 2-3.

In response to the defendant's motion, the state filed a Bill of

Particulars dated February 10, 1986, alleging that the offenses took place during the late afternoon, early evening hours, on one of the last two weekends in July 1984. R. at 3-6. The date of the assault was thus restricted to one of four possible dates: July 21, 22, 28, or 29, 1984.

Despite the fact that the state's allegations had narrowed the occurrence to a period of several hours on one of four days in July, the defendant filed a motion to dismiss the information, alleging that "the amended information as to date and time is not specific enough for him to assert an alibi defense, to confront his accuser, and in general to adequately present a defense." The trial court denied the motion on February 10, 1986, the same

date that it was filed. R. at 7.

On February 13, 1986, after the jury had been sworn,[3] the defendant filed a motion requesting receipt of further particulars or, alternatively, dismissal of the charges. R. at 7-10. At the hearing on the defendant's motion, counsel for the defendant claimed to have alibi witnesses for three of the four days alleged by the state. T. at 8. The court again denied the defendant's motion. R. at 10.

On the following day, counsel for the defendant provided the court with affidavits of his claimed alibi witnesses. R. at 14. After receiving the affidavits, the trial court reconsidered the defendant's motion sua sponte and

---

[3] The jury was sworn on February 10, 1984.

dismissed the information. R. at 11; see Petitioner's Appendix at 16A-42A (Trial Court's Oral Memorandum of Decision). The state immediately excepted to the trial court's ruling and requested permission to appeal pursuant to Connecticut General Statutes § 54-96. The defendant objected to the state's request claiming that such an appeal would violate double jeopardy. The trial court overruled the defendant's objection and gave the state permission to appeal. T. at 31-32.

The state's appeal was originally filed in the Connecticut Appellate Court. On March 7, 1986, the defendant moved to dismiss the state's appeal on the ground that it was barred by the Double Jeopardy Clause of the United State's Constitution. The state opposed

the defendant's motion; both sides filed memoranda of law setting forth their positions. After hearing argument, the Appellate Court denied the motion to dismiss. Thereafter, the Connecticut Supreme Court transferred the appeal to itself, pursuant to Practice Book § 4023.

In his brief on appeal, the defendant claimed that the trial court's dismissal was the functional equivalent of an acquittal and that a remand for trial would violate the double jeopardy clause of the Fifth Amendment to the United State's Constitution and the due process clause of the Connecticut Constitution. On December 15, 1987, the Connecticut Supreme Court found that the trial court erred in granting the defendant's motion to dismiss and that double

jeopardy did not bar a remand for trial. The court therefore remanded with direction to deny the motion to dismiss and for further proceedings according to law. State v. Evans, 205 Conn. 528, 534 A.2d 1159 (1988).

The defendant petitions for a writ of certiorari to review the Connecticut Supreme Court's resolution of his double jeopardy claim.

SUMMARY OF THE ARGUMENT

The defendant contends that the trial court's order dismissing the information after jeopardy had attached was a dismissal "on the merits" and, as such, operated as an acquittal. Petition at 17-18. He bases this contention on two premises: first, that the trial court ruled, albeit erroneously, that time was an element of each offense

alleged by the state; and second, that the state conceded it could not prove the precise date on which the assaults occurred. Petition at 15-16. Thus he contends that the trial court dismissed the charges because it considered the state's evidence legally insufficient.

The defendant's petition does not warrant this court's consideration. The opinion below neither disregards precent nor poses an issue on which various jurisdictions are split.

Moreover, the record reveals that the trial court based its dismissal on considerations of notice and prejudice to the defendant's anticipated defense, not on the sufficiency of the evidence. On this basis, the Connecticut Supreme Court correctly held that the trial court's dismissal was not a determina-

tion of any of the factual elements of the offense charged. State v. Evans, 205 Conn. at 538.

Nevertheless, even if the defendant's premises are accepted as true, the Connecticut court's resolution is sound. A trial court's erroneous assumption that time is an element of an offense cannot change the composition of a statutorily-defined crime. Therefore, because the dismissal was entered at the defendant's request and on basis unrelated to guilt or innocence, a subsequent trial does not violate double jeopardy.

REASONS FOR DENIAL OF THE WRIT

PETITIONER'S CLAIM IS CONTROLLED BY ESTABLISHED CASE LAW AND THUS DOES NOT WARRANT THIS COURT'S ATTENTION

The mere fact that the jury had been sworn, and thus jeopardy attached;

Serfass v. United States, 420 U.S. 377 (1975); prior to dismissal does not mean that further proceedings against the defendant are barred. The law is clear that, where "the defendant elect[s] to seek termination of the trial on grounds unrelated to guilt or innocence," a retrial does not offend double jeopardy. United States v. Scott, 437 U.S. 82, 96-97 (1978). The operative question is whether "`the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'" Id., at 97 quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

A review of the proceedings reveals that the trial court never weighed the

evidence in this case. Indeed, at the time of its ruling no evidence had yet been presented.[4] Rather, the court simply concluded, as a matter of law, that the state's inability to allege the precise date of the offense prejudiced the defendant in the preparation of his case and the presentation of his alibi. The court's ruling was thus based on the defendant's rights to notice of the charges against him and to present a defense, not on a finding of insufficiency.

---

[4] The Connecticut Supreme Court found that "prior to the dismissal of the substitute information, the trial judge had before him for consideration only the record pleadings (the substitute information and the motions) and the three affidavits submitted by the defendant for consideration in support of his motion to dismiss." State v. Evans, 205 Conn. at 528, 536, 534 A.2d 1159 (1988). None of these documents constitute evidence. Id.

Although the trial court's characterization of the nature of its action is not determinative; United States v. Sisson, 399 U.S. 267, 270 (1970); review of the basis of the defendant's trial motions and the scope of the court's ruling is illuminating. The defendant's original motion to dismiss asserted that the "amended information as to date and time is not specific enough for him to assert an alibi defense, to confront his accuser, and in general to adequately present a defense." R. at 7. His subsequent motion, in which he requested further specification in the pleadings or a dismissal, again asserted that "[w]ithout the specific date of the alleged offenses the Defendant will be seriously prejudiced and his constitutional rights to due process, equal

protection, confrontation, and effective assistance of counsel under the State and Federal Constitutions violated." R. at 9. Further, when granting the defendant's motion, the trial court "specifically disclaimed making a factual determination of whether the defendant is guilty or innocent of the charges." State v. Evans, 205 Conn. at 538.[5] Instead, the court made clear

[5] The Connecticut Supreme Court quoted from the trial court's oral memorandum of decision as follows:

> In rendering its decision the trial court stated: `I want it completely understood that [this decision] is in no way related to my opinion as to whether or not the defendant is guilty or not guilty of these charges. That is not my function . . .[this decision] is not to be considered by anyone [as] an opinion by me that I think that the defendant is innocent of these charges. My decision is not to be given any weight with regards to innnocence or guilt.

that its ruling was based on a supposition prejudice to the defendant's alibi defense. See R. at 17; Petitioner's Appendix at 34A (oral memorandum) ("Without knowing the specific dates that this event is alleged to have occurred, it's impossible for the jury to be able to weigh an alibi defense against the testimony of the victim because there is no way that the jury will be able to say, well, this event occured (sic) on July 1st, hypothetically, and the defendant has an alibi for July 1st.")

Thus, neither the court nor the defendant himself characterized the issue at trial as one of guilt or innocence. Rather, it is clear that the defendant was asserting his right to

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State v. Evans, 205 Conn. at 533.

sufficient specificity in the charges to allow him to prepare his defense. Further, once the date of the offenses was narrowed down to four days in July 1984, the defendant contended that the state's inability to pinpoint the precise day denied him the effectiveness of his proposed alibi defense.

The defendant's assertion that the court dismissed on the mistaken belief that the date of an offense is an essential element is not supported by the record. In its oral ruling, the court noted that " . . . [Connecticut] law is pretty well established that unless the date is an element of the--material element of the crime, the specific date and time of the event is not essential." R. at 15; Petitioner's Appendix at 31A. The court went on to

note that some authority indicates that the date "may be material where not providing the date may prejudice the rights of the defendant to assert defenses." Id. When the court's remarks are viewed in context, it is clear that the court did not find that an alibi transforms the date of an offense into an element of the crime, but only that the date may become "material" to the defendant if he asserts an alibi defense.

Nevertheless, if the court's remarks are interpreted to signify that it believed the date of the offense is, under some circumstances, an element of the crime, the defendant is still not entitled to the double jeopardy protection he claims. A trial court's erroneous assumption that something is an

element of the crime does not make it so. United States v. Maker, 751 F.2d 614, 624 (3rd Cir. 1984) cert. denied, 472 U.S. 1017 (1985) (holding that district court's dismissal because the state could not prove what it erroneously assumed to be an element of the offense did not operate as an acquittal.) Therefore, because the court did not determine any of the actual elements of the offense in the defendant's favor, double jeopardy presents no barrier to prosecution. The public should not be deprived of "its valued right to 'one complete opportunity to convict those who have violated its laws.' Arizona v. Washington, [434 U.S. 497, 509 (1978)]." United States v. Scott, 437 U.S. at 100.

CONCLUSION

Because the issue advanced by petitioner is not one on which various courts have split and may be comfortably decided on the basis of existing case-law, it does not warrant this Court's attention. The State of Connecticut respectfully urges this Court to deny the defendant's petition for certiorari.

Respectfully submitted,
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